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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

E.E. by and through her *guardian ad litem* A.J.
and L.N. by and through his *guardian ad litem*
K.N., on behalf of themselves and a class of
those similarly situated; and DISABILITY
RIGHTS EDUCATION & DEFENSE FUND,
Plaintiffs,

vs.

STATE OF CALIFORNIA; CALIFORNIA
STATE BOARD OF EDUCATION; and
CALIFORNIA DEPARTMENT OF
EDUCATION,

Defendants

CASE NO.: 4:21-cv-07585-AGT

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
EX PARTE MOTION FOR TRO AND OSC
RE: PRELIMINARY INJUNCTION**

Judge: Hon. Alex G. Tse
Courtroom: A, 15th floor

Date Action Filed: September 29, 2021

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**MEMORANDUM OF POINTS AND AUTHORITIES ISO *EX PARTE* MOTION
FOR TRO AND OSC RE: PRELIMINARY INJUNCTION**

I. INTRODUCTION

Students with disabilities began school this fall only to find that the distance learning programs to which they had adapted during the global pandemic were closed to them, although the peril from Covid-19 continues. During the summer, before the Delta Variant surged, California adopted a new state law, Assembly Bill 130 (“AB 130”), which shifted funding for virtual instruction from distance learning to a modified form of Independent Study. Chapter 44, Statutes of 2021, Sec 53. Under the new law, a child can enroll in Independent Study if their parents decide the student’s “health would be put at risk by in-person instruction.” Cal. Educ. Code § 51745(a)(6). But only non-disabled students who can follow the standard state curriculum may enroll in Independent Study by right.

In contrast, special education students with an Individualized Education Plan (“IEP”) cannot enroll in Independent Study unless their school IEP team approves. *Id.*, § 51745(c). And as the family declarations in support of this motion attest, IEP teams frequently will not approve Independent Study, especially for students with intellectual and developmental disabilities (“I/DD”). These students typically study on an alternative curriculum, which is barred in Independent Study, and need more adult assistance than is available through school districts’ existing Independent Study programs.

As the supporting family declarations also attest, many disabled students are at such heightened risk from Covid-19 that their parents are “fully justified” in insisting that they remain in distance learning as it existed before the new state law. Declaration of Dr. Alice Kuo (“Kuo Decl.”), ¶ 20. Since AB 130 restricts funding for virtual instruction only to Independent Study, children and their families denied Independent Study face an impossible choice: keep their child at home with no instruction, or send them to in-person classes despite the

1 disproportionate risk of illness and death.¹

2 These harms are directly attributable to the State Defendants. The State of California is
3 responsible for adopting a statute that discriminates against disabled students by denying them
4 the access to virtual learning that is freely available to non-disabled students. School districts
5 are regularly finding that Independent Study is not an appropriate placement for disabled
6 students with IEPs, especially for students with high support needs. In these circumstances,
7 because the State now limits funding for virtual learning to Independent Study, school districts
8 either ask the student risk their health and safety to return in-person or waive their rights to
9 needed services and accommodations. The State has unconscionably and illegally forced
10 families to choose between keeping their medically vulnerable children safe from the ongoing
11 COVID-19 pandemic or receiving an education. These students require immediate relief from
12 the Court in the form of a preliminary injunction.

13 *First*, Plaintiffs are likely to succeed on the merits of their claims. Defendants' failure to
14 ensure that COVID-vulnerable disabled students with IEPs have an equal opportunity to be
15 educated at home as non-disabled students is a straightforward violation of Title II of the
16 Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et seq.

17 *Second*, Plaintiffs and other similarly situated students are likely to suffer irreparable
18 harm without immediate relief. They are at increased risk of severe illness from the Delta
19 Variant of COVID-19, and face educational regression without an appropriate at-home
20 educational placement. Some families are facing charges of truancy. Others have accepted
21 unconscionable offers to participate in Independent Study on the condition that they waive the
22 student's federal and state civil rights to needed services and accommodations. Defendants must
23 take the actions this motion seeks in order to prevent further harm to Plaintiffs and other
24 similarly situated students identified in this motion.

25 *Third*, the requested injunction will maintain the *status quo ante litem* pending a
26

27 ¹ Having I/DD is itself a major risk factor for Covid-19. Kuo Decl. ¶¶ 2, 10-13. These risks are
28 increased for the many students who also have immune disorders, lung disease, or other
conditions that put them in jeopardy. *See* Family Declarations submitted concurrently and
summary of Family Declaration, Appendix A attached hereto.

determination of the case on the merits. *Regents of Univ. of Cal. v. Am. Broad. Co.*, 747 F.2d 511, 514 (9th Cir. 1984). Here, the status quo is the situation that existed before the adoption of enactment of AB 130, when disabled students had access to distance learning with the supports they needed. The proposed injunction will restore that status quo and end the injury that the new law has imposed on Plaintiffs.

Fourth, the balance of equities and public interest tip sharply in favor of Plaintiffs. Any interest Defendants may have in implementing AB 130 with respect to the students at issue is outweighed by the injury that results when students with IEPs are effectively excluded from school.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Student Plaintiffs and other similarly situated DREDF Constituents.

Plaintiffs seek emergency relief for the two individual student plaintiffs and thirteen similarly situated students whose families are constituents of the Disability Rights Education and Defense Fund (“DREDF”), an organizational plaintiff here. The students have intellectual and developmental disabilities such as Down syndrome and autism, and respiratory conditions such as asthma and lung disease that place them at greatly heightened risk from COVID-19. Plaintiffs’ medical expert explains that “having an intellectual disability was the strongest independent risk factor for presenting with a Covid-19 diagnosis and the strongest independent risk factor other than age for Covid-19 mortality,” with a “higher concentration of COVID-19 cases at younger ages.” Kuo Decl., ¶ 11-13. These risks and harms are recognized by the American Academy of Pediatrics and the Centers for Disease Control and Prevention (CDC). *See* Section III.B.1, *supra*.

One student at risk is Plaintiff E.E. She is six years old and has Down syndrome and associated medical conditions that make her highly susceptible to infection and at heightened risk of serious complications if she is exposed to COVID-19. Her mother requested Independent Study for E.E. and her twin sister when they started kindergarten this fall. After weeks of delay, school district staff said E.E. would not be able to access Independent Study successfully due to her need for significant adult support. Declaration of A.J. The district would only provide the

1 services in her IEP if she attended in person, not through Independent Study. E.E. is still is still
 2 at home with no educational program, even though school started in later August. In contrast,
 3 E.E.'s typically developing twin sister was able to enroll in Independent Study immediately
 4 because she did not have an IEP. *Id.*

5 Another affected child is D.A., whose placement since kindergarten has been a non-
 6 public school that serves students with autism. Declaration of D.H. He is non-verbal, but was
 7 able to participate successfully in distance learning last year. Because he is at heightened risk
 8 from Covid-19, his parents asked that he continue with virtual instruction. His non-public
 9 school was happy to assist, but technical limitations in AB 130 made that impossible. As a
 10 result, he has been home with no instruction since August. Students with I/DD such as D.A.
 11 need constant reinforcement to maintain the skills they have painstakingly acquired, so this
 12 interruption will cause isolation and skills regression that they may never recoup. Decl. of Dr.
 13 Andrea Ruppar ("Ruppar Decl."), ¶¶ 3, 22-24.

14 The other students for whom a TRO is requested are constituents of DREDF, which is
 15 an organizational Plaintiff. They are in similar situations and have experienced the same harms.
 16 The students have Down syndrome, autism, cerebral palsy, respiratory illnesses such as asthma
 17 and lung disease, and autoimmune disorders. They include students who struggle to comply
 18 with mask and social distancing protocols as a result of their physical and intellectual
 19 disabilities. They are also at increased risk of exposure to COVID-19 and for severe outcomes
 20 from COVID-19. Their families have requested placement in Independent Study or another
 21 distance learning placement, with the services and supports that their student received last year.
 22 Some have been denied Independent Study, or have been told that they must waive their state
 23 and federal civil rights to access the program.² As a result of AB 130, students have been left
 24 with no educational placement, and are experiencing irreparable harms.³ See Family

25
 26 ² Declaration of Cheryl Theis ("Theis Decl."); Declaration of Susan Henderson ("Henderson
 Decl.").

27 ³ Although hundreds and perhaps even thousands of children are affected by AB 130 and the
 28 new limits on virtual instruction, most are too fearful of retaliation to come forward. Declaration
 of Robert Borrelle ("Borrelle Decl."). Some have accepted one-sided agreements that require

1 Declarations. An index to these family declarations and a summary of each family's situation is
2 submitted concurrently and attached hereto as an Appendix.

3 **B. Prior to AB 130, California made distance learning available and accessible**
4 **to all students, including students with IEPs and high support needs.**

5 In 2020, in response to the developing COVID-19 pandemic, California enacted laws to
6 ensure that school districts offered all students access to distance learning. Cal. Educ. Code §
7 43500 et seq. This statute was inclusive: "Distance learning shall include ... Special education,
8 related services, and any other services required by a pupil's individualized education program
9 ("IEP") pursuant to [state law] ... with accommodations necessary to ensure that individualized
10 education program can be executed in a distance learning environment." *Id.*, § 43503(b)(4)
11 (emphasis added). Distance learning was broadly available, including for students who are
12 medically fragile or would be put at risk by in-person instruction. Cal. Educ. Code
13 § 43503(a)(2).⁴ Under distance learning, school districts were required to implement the
14 student's IEP to the maximum extent possible in a virtual environment. *Id.*, § 43503(b)(4). This
15 state, in which disabled students had equal access to virtual instruction and the services in their
16 IEP, constitutes the status quo.

17 **C. Through AB 130, California made Independent Study the only option for**
18 **virtual learning – but it excludes disabled students by design.**

19 California adopted a new statute in July 2021 that restricted funding for virtual learning
20 to one format only - Independent Study. AB 130, Chap. 44, Stats of 2021, Sec. 53, approved on
21 July 9, 2021. The existing statutory requirements of Independent Study were modified slightly

22 _____
23 them to waive their rights under federal and state law, and that also include confidentiality
24 clauses. Theis Decl.; Henderson Decl.; Borrelle Decl.; Declaration of David German ("German
Decl."); Declaration of Lauren Lystrup ("Lystrup Decl.")).

25 ⁴ The State did not consider distance learning a "change in placement," meaning it did not
26 require school districts to make an affirmative offer of FAPE in a remote setting. California
27 Department of Education, "Special Education Guidance for Covid-19," (Posted April 9, 2020)
28 (available online at: <https://www.cde.ca.gov/ls/he/hn/specialedcovid19guidance.asp>) ("Under
this unique circumstance, in the CDE's view it is not necessary for an LEA to convene an IEP
team meeting, or propose an IEP amendment without a team meeting, for every student, solely
for the purpose of discussing the need to provide services away from school, because that
change must necessarily occur due to the COVID-19 pandemic.").

1 by this legislation, but none of these changes mitigated the inaccessibility of the format to
 2 students with disabilities. Independent Study is now the only virtual learning model that the
 3 State is funding for students “whose health would be put at risk by in-person instruction, as
 4 determined by the parent or guardian of the pupil.” Cal. Educ. Code § 51745(a)(6).

5 Unfortunately, the very design of Independent Study is not accessible to students with
 6 disabilities. First, it explicitly excludes students with disabilities from participation as of right.
 7 Students with disabilities “shall not participate in independent study, unless the pupil’s
 8 individualized education program [IEP] ... specifically provides for that participation.” Cal.
 9 Educ. Code § 51745(c) (emphasis added). This automatically creates a lengthy delay in
 10 accessing Independent Study that was not true of distance learning prior to AB 130.

11 Second, Independent Study includes few hours of direct instruction, which students with
 12 I/DD need at all times. “Synchronous instruction” is provided by a teacher but may be offered
 13 only once a day for younger students and once a week for older students; the duration of such
 14 instruction is not specified and can be no more than a brief review of assigned work sheets.⁵
 15 Defendant CDE explicitly instructs that: “Independent study is not for all students as it requires
 16 basic academic skills, as well as a level of commitment, motivation, organizational skills, and
 17 self-direction make the satisfactory educational progress as required per [State law].”⁶

18 Third, AB 130 explicitly excludes students who need a modified curriculum from
 19 Independent Study. Many students with intellectual and developmental disabilities cannot
 20 access the State’s “Common Core” general education curriculum without modifications. They
 21 receive instruction based on alternative achievement standards, or an “alternate curriculum.” 34
 22 C.F.R. § 200.1(d); Ruppar Decl. ¶ 17. Such curricula are “[d]esigned for students with the most
 23 significant cognitive disabilities.” *Id.* The Independent Study law permits “[i]ndividualized
 24 alternative education designed to teach the knowledge and skills of the core curriculum,” but
 25

26 ⁵ Cal. Educ. Code § 51747(e)(1)-(3).

27 ⁶ California Department of Education, “Independent Study Program Summary,” (last updated
 28 September 24, 2021) (available online at <https://www.cde.ca.gov/sp/eo/is/isprogramsummary.asp>).

1 prohibits the use of a modified curriculum: “Independent study shall not be provided as an
 2 alternative curriculum.” Cal. Educ. Code § 51745(a)(3) (emphasis added). The State’s
 3 prohibition on offering such curricula through Independent Study excludes many students with
 4 intellectual and developmental disabilities.⁷

5 **III. ARGUMENT**

6 A Temporary Restraining Order (“TRO”) may be issued upon a showing “that
 7 immediate and irreparable injury, loss, or damage will result to the movant before the adverse
 8 party can be heard in opposition.” Fed. R. Civ. P. 65(b)(1)(A). The analysis for a TRO and a
 9 preliminary injunction is the same. *Frontline Med. Assoc., Inc. v. Coventry Healthcare Workers*
 10 *Compensation, Inc.*, 620 F. Supp. 2d 1109, 1110 (C.D. Cal. 2009).

11 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed
 12 on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that
 13 the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
 14 *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Under the Ninth Circuit’s “sliding scale”
 15 approach to preliminary injunctions, a plaintiff need only show that “serious questions” exist as
 16 to success on the merits where the balance of hardships tips sharply in the plaintiff’s favor and
 17 the plaintiff has demonstrated a likelihood of irreparable harm. *Alliance for Wild Rockies v.*
 18 *Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

19 As explained below, Plaintiffs meet the standard for a TRO and a preliminary injunction
 20 in this case.

21 **A. Plaintiffs Are Likely to Succeed on the Merits.**

22 California’s new statutory restrictions on remote learning violate Plaintiffs’ rights under
 23 the Title II of the ADA and Section 504. Plaintiffs can show a likelihood of success on the
 24 merits — or at least raise “serious questions” as to the success on the merits — on these claims.
 25 *See, e.g., Ahlman*, 445 F. Supp. 3d 671, 687-92 (C.D. Cal. 2020) (finding a likelihood of success
 26 on both due process and disability claims). This is because Defendants are discriminating

27 _____
 28 ⁷ Many other students with IEPs have been denied Independent Study because they are on an
 alternate curriculum. *See* decls of M.G. (student with Down syndrome), R.C. (student with
 autism), H.H. (student with autism and cerebral palsy).

1 against students with disabilities in violation of Title II of the ADA and Section 504 of the
2 Rehabilitation Act. 42 U.S.C. § 12132; 29 U.S.C. § 794(a).

3 Title II of the ADA applies to all of the activities of public entities, including providing
4 education. Each Defendant is a state agency and public entity. Plaintiffs and other similarly
5 situated students are all individuals with disabilities. *See* decls. of A.J., K.N., and Family
6 declarations. They are also qualified to attend public school. *Id.*, § 12102(1)(A), (2)(B); 28
7 C.F.R. § 35.108(d)(2)(iii).

8 To comply with Title II, public entities must take affirmative steps to ensure that people
9 with disabilities can participate in programs, benefits, and services on an equal and equally safe
10 basis as people without disabilities. 28 C.F.R. §§ 35.102(a), 35.130(a), (b); *Updike v.*
11 *Multnomah Cty.*, 870 F.3d 939, 949 (9th Cir. 2017).

12 Barring a fundamental alteration, public entities must “make reasonable modifications in
13 policies, practices, or procedures when the modifications are necessary to avoid discrimination
14 on the basis of disability[.]” 28 C.F.R. § 35.130(b)(7)(i). Public entities may not provide
15 different or separate aids, benefits, or services to individuals with disabilities than are provided
16 to others, unless they can show that such action is necessary to provide qualified individuals
17 with disabilities with aids, benefits, or services that are as effective as those provided to others.
18 28 C.F.R. § 35.130(b)(1)(iv). They cannot “utilize criteria or methods of administration . . .
19 [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the
20 basis of disability.” 28 C.F.R. § 35.130(b)(3). Public entities may not provide disabled people
21 with “an aid, benefit, or service that is not as effective in affording equal opportunity to obtain
22 the same result, to gain the same benefit, or to reach the same level of achievement as that
23 provided to others.” 28 C.F.R. § 35.130(b)(1)(iii). They must provide services to disabled
24 people in the “most integrated setting appropriate for [their] needs.” 28 C.F.R. § 35.130(d).
25 Section 504 includes analogous requirements.

26 By their implementation of AB 130, Defendants have violated the ADA and Section 504
27 of the Rehabilitation Act by effectively excluding a group of COVID-vulnerable disabled
28 students from public school in the state. Defendants are discriminating against students with

disabilities, and failing to take required affirmative steps to ensure students with disabilities are receiving an equal educational opportunity in an equally safe environment.

///

1. Defendants Violate the ADA by Excluding Disabled Students from Virtual Learning.

California is denying distance learning and alternatives to in-person classes to students with disabilities. It has done so by setting up Independent Study as the only way to access distance learning and the only alternative to in-person classes. But Independent Study is not accessible to students with disabilities. Defendants imposed this method by legislation despite the fact that non-discriminatory alternatives existed.

It was inevitable that students with disabilities would be denied access to Independent Study: Independent Study⁸ is structured in such a way that placement in Independent Study through an IEP is inappropriate for the majority of students with disabilities.⁹ The State defines Independent Study as appropriate only for students who can work independently, which many students with disabilities cannot.¹⁰ It offers Independent Study only on the Core Curriculum, which necessarily excludes many students with disabilities, especially those with moderate to severe disabilities and those with intellectual and developmental disabilities. These students are thus denied access to their entire education because they cannot safely attend in-person classes.

Some students with IEPs may be able to learn independently, but students with I/DD generally require adult assistance to learn. Ruppar Decl., ¶¶ 33-35. This is a tragic example of discrimination based on severity of disability, which violates the ADA even when it is unwitting, as appears to be the case here. *See, e.g., Lovell v. Chandler*, 303 F.3d 1039, 1054 (9th Cir. 2002).¹¹

⁸ *See* Cal. Educ. Code § 51745(c).

⁹ *See* Ruppar Decl., ¶¶ 4, 32-35.

¹⁰ *See* California Department of Education, *supra* note 6.

¹¹ The fact that some disabled students are able to participate in Independent Study does not lessen the ADA violation. Instead, “[t]he State’s appropriate treatment of some disabled persons does not permit it to discriminate against other disabled people under any definition of “meaningful access.” *Lovell*, 303 F.3d 1054. *Accord Amundson ex rel. Amundson v. Wisconsin*

1 Disabled students placed at non-public schools are at a special disadvantage. Non-public
 2 schools are specialized private schools in which districts place students with such severe
 3 disabilities that they cannot be served on a public school campus. But when these students
 4 requested virtual instruction, they found that Independent Study does not permit funding for
 5 virtual instruction provided by nonpublic schools and nonpublic agencies. Decl. of K.H., M.H.,
 6 Y.K. For example, student H.H. began the school year receiving distance learning with services
 7 and accommodations through her NPS. After two days, her NPS shut the program down,
 8 explaining that CDE was not funding an NPS to provide remote learning. M.H. decl.

9 The problem may be entirely technical. It might that State law requires that an
 10 Independent Study program be provided under the supervision of a school district employee,¹²
 11 or that Independent Study is a “placement” that cannot be combined with another “placement”
 12 such as a non-public school. Regardless, this merely demonstrates why disabled students need a
 13 third option, other than in-person classes or Independent Study.

14 **2. Defendants Are Violating the ADA by Denying Disabled Students** 15 **Needed Accommodations in Independent Study.**

16 Defendants have failed to ensure that disabled students who wish to participate in
 17 Independent Study have access to the accommodations, aids and services they need to benefit
 18 equally from their education. Given the state’s design of Independent Study, many school
 19

20 *Dep’t of Health Servs.*, 721 F.3d 871, 874 (7th Cir. 2013); *Nelson v Milwaukee County*, 2006
 21 WL 290510 at *5 (E.D. Wis. 2006); *Martin v. Voinovich*, 840 F.Supp. 1175, 1191–92 (S.D.
 22 Ohio 1993); *Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F.Supp. 1243, 1299 (D.N.M.
 23 1990), rev’d on other grounds, 964 F.2d 980 (10th Cir. 1992); *Garrity v. Gallen*, 522 F.Supp.
 24 171, 214–15 (D.N.H. 1981); *Lynch v. Maher*, 507 F.Supp. 1268, 1278–79 n.15 (D.Conn.1981);
Messier v. Southbury Training Sch., No. 3:94-CV-1706(EBB), 1999 WL 20910, at *10 (D.
 Conn. Jan. 5, 1999) (“Courts hold repeatedly that the ADA and Section 504 prohibit
 discrimination on the basis of severity of disability.”).

25 ¹² See Cal. Educ. Code § 51747.5(a) (“The independent study by each pupil shall be
 26 coordinated, evaluated, and, notwithstanding subdivision (a) of Section 46300, shall be under
 27 the general supervision of an employee of the school district, charter school, or county office of
 28 education”); see also Cal. Educ. Code §§ 46300(a) (referencing requirement of “immediate
 supervision and control of an employee of the district or county office”), 51745.6 (restricting
 school districts from assigning a district employee to supervise the delivery of disability-related
 services and accommodations to students by a non-public agency).

1 districts are asking disabled students for a waiver of their civil rights to disability-related
 2 services and accommodations as a condition of participation in Independent Study.¹³ Plaintiff
 3 DREDF and other groups that assist with special education issues have been contacted by and
 4 advised numerous families who report that they have been forced to sign such waivers to access
 5 virtual instruction.¹⁴ These students then must attempt to participate in Independent Study
 6 without the accommodations and supports they need to be successful in the program. Without
 7 these services, students cannot access their education.

8 Although this result violates the ADA, it is consistent with the new California statute.
 9 Students with IEPs cannot participate in Independent Study unless their IEP team agrees. Cal.
 10 Educ. Code § 51745. IEP teams consistently make a single offer of special education services,
 11 which is only in-person. Some IEP teams have agreed to permit parents to enroll their child in
 12 Independent Study, despite their belief that it will likely be inaccessible for them, but only upon
 13 condition of a waiver of the student's civil rights to disability-related services and
 14 accommodations, rejecting subsequent requests for the accommodations, services, and supports
 15 that might make the program accessible.

16 **3. Defendants violate the ADA by not providing disabled students with**
 17 **an alternative to in-person classes that is as effective and safe as that**
 18 **available to non-disabled students.**

19 The ADA regulations provide that a public entity may not “[u]tilize criteria or methods
 20 of administration that have the effect of defeating or substantially impairing the accomplishment
 21 of the objectives of the public entity's program with respect to individuals with disabilities.” 28

22
 23 ¹³ See Declarations of M.H. and A.J. One local school board created a standard waiver
 24 agreement that it announced publicly as a “proposed solution” for students when the IEP team
 25 refuses to offer distance learning: “The agreement is that the student can participate in [the
 26 district’s] Virtual Academy (Independent Study), but the student's educational rights’ holder
 27 waives all FAPE claims (since the IEP team determined Independent Study is not FAPE).” See
 28 Pleasanton USD Board, Report and Discussion on the Pleasanton Virtual Academy/Independent
 Study Program for Students with Individualized Education Plans (IEPs) (Sept. 23, 2021),
https://simbli.eboardsolutions.com/SB_Meetings/ViewMeeting.aspx?S=36030382&MID=8254;
<https://simbli.eboardsolutions.com/Meetings/Attachment.aspx?S=36030382&AID=168845&MID=8254>.

¹⁴ Decls. of German, Theis, Borrelle, Lystrup.

1 C.F.R. § 35.130(b)(3)(ii).

2 Here, the State Defendants are responsible for providing special education services to
3 disabled students. Yet in administering their special education program, they have failed to
4 ensure that students with IEPs have a safe alternative to in-person classes. They have issued
5 FAQs, but failed to ensure that disabled students had the same access to distance learning
6 enjoyed by other students. That this has occurred during a dangerous surge in COVID-19 cases
7 as a result of the Delta Variant makes their inaction even more objectionable.

8 In this case, the State’s failure to act has led to outcomes as discriminatory as if it flatly
9 denied students access to distance learning. “The methods-of-administration regulation makes
10 clear that a know-nothing, do-nothing policy of non-administration is a privately actionable
11 violation of the ADA.” *Dunn v. Dunn*, 318 F.R.D. 652, 665 n.12 (M.D. Ala. 2016), modified on
12 other grounds sub nom. *Braggs v. Dunn*, No. 2:14CV601-MHT, 2020 WL 2395987 (M.D. Ala.
13 May 12, 2020).¹⁵

14 Under Title II of the ADA, the State Defendants are still responsible, even if local school
15 districts make the actual decision to deny virtual learning or supports and accommodations to a
16 particular student. The State of California must ensure that the agencies it funds, supervises and
17 with which it contracts, including local school districts, do not discriminate. “A public entity, in
18 providing any aid, benefit, or service, may not, directly *or through contractual*, licensing, or
19 other arrangements” discriminate against individuals with disabilities. 28 C.F.R. § 35.130(b)(1)
20 (emphasis added). Further, a public entity may not “[a]id or perpetuate discrimination . . . by

21 _____
22 ¹⁵ See also, *Lewis v. Cain*, 324 F.R.D. 159, 176 (M.D. La. 2018) (state correctional agency’s
23 failure to adequately train prison employees, and to adopt procedures for requesting
24 accommodations violated the ADA); *Day v. D.C.*, 894 F. Supp. 2d 1, 20 (District’s failure to
25 adopt a plan to move residents out of nursing facilities and to inform them of community
26 alternatives and discharge planning violated the ADA); *State of Conn. Office of Prot. &*
27 *Advocacy for Pers. with Disabilities v. Connecticut*, 706 F. Supp. 2d 266, 276–78 (denying
28 motion to dismiss where complaint alleged that the state “failed to adequately assess and
identify the long-term care needs of Plaintiffs and the Class they represent,” and “failed to
inform Plaintiffs and the Plaintiff Class members of the availability of alternatives to nursing
home care”); *Kathleen S. v. Dep’t of Pub. Welfare of Com. of Pa.*, 10 F. Supp. 2d 460, 471–73
(E.D. Pa. 1998) (state agency’s “failure to initiate” discharge planning from a hospital and
“failure to adequately plan for the community placements” violated the ADA).

1 providing significant assistance to an agency, organization, or person that discriminates on the
 2 basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's
 3 program[.]” 28 C.F.R. § 35.130(b)(1)(v).

4 As regards the California Department of Education in particular, under state and federal
 5 law special education law, it is responsible for the oversight and supervision of local school
 6 districts. 20 U.S.C. § 1412(a)(11)(A); 34 C.F.R. § 300.149(a); *see also* Cal. Ed. Code §§ 56100
 7 and 56205; *Emma C. v. Eastin*, 985 F. Supp. 940, 948 (N.D. Cal. 1997) (complaint adequately
 8 alleged that CDE “failed to monitor [the district’s] compliance with state and federal laws” and
 9 perpetuated this discrimination.”).

10 **B. Plaintiffs Have Demonstrated Irreparable Harm.**

11 Plaintiffs have demonstrated irreparable harm. As an initial matter, AB 130 causes
 12 irreparable harm because it violates federal disability laws. *See* Section II.A., *supra*. Where a
 13 “defendant has violated a civil rights statute,” courts “presume that the plaintiff has suffered
 14 irreparable injury from the fact of the defendant's violation.” *Silver Sage Partners, Ltd. v. City*
 15 *of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) (citing cases); *see also Gresham v.*
 16 *Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984) (“[I]rreparable injury may be
 17 presumed from the fact of discrimination and violations of fair housing statutes”); *Duke v.*
 18 *Uniroyal, Inc.*, 777 F. Supp. 428, 433 (E.D.N.C. 1991) (noting that “[t]he purpose of the
 19 presumption of irreparable injury in civil rights cases is to afford plaintiffs relief in areas where
 20 injury is difficult to establish.”). Thus, Defendants’ violation of the ADA and the Rehabilitation
 21 Act alone give rise to a presumption of irreparable injury. Further, Plaintiffs need only
 22 demonstrate that irreparable harm “is *likely* in the absence of an injunction.” *Winter v. Nat. Res.*
 23 *Def. Council*, 555 U.S. 7, 22 (2008) (emphasis added).

24 There is also ample evidence of concrete and palpable harm to children and their
 25 families. AB 130 has forced parents to choose between the harm of losing educational
 26 opportunity or risking their health and safety. The grave risk of a “severe, and quite possibly
 27 fatal, infection . . . constitutes irreparable harm warranting” relief. *Basank v. Decker*, No. 20-
 28 2518, 2020 WL 1481503, at *4 (S.D.N.Y. Mar. 26, 2020); *see also M.R. v. Dreyfus*, 663 F.3d

1 1100, 1111 (9th Cir. 2011), *as amended by* 697 F.3d 706 (9th Cir 2012); *Indep. Living Cent. of*
 2 *S. California, Inc. v. Shewry*, 543 F.3d 1047, 1050 (9th Cir. 2008). Faced with this impossible
 3 choice and under pressure from work and threats of truancy citations, some parents have given
 4 up and sent their children to in-person classes despite the health risk. Paredes Decl. (parents fear
 5 truancy citations and cannot supervise their children at home because of work demands). Others
 6 have accepted settlements that permit virtual learning but without the accommodations, their
 7 children need to learn. Decls. of Borrelle, Lystrup, Paredes. And many other students, like the
 8 Student Plaintiffs and DREDF constituents, remain at home with nothing.

9 Plaintiff DREDF has also been injured by the diversion of its resources and frustration
 10 of its mission as a result of the crisis and disruption that AB 130 has imposed on so many
 11 families. “An organizational plaintiff must show that the defendant's actions run counter to the
 12 organization's purpose, that the organization seeks broad relief against the defendant's actions,
 13 and that granting relief would allow the organization to redirect resources currently spent
 14 combating the specific challenged conduct to other activities that would advance its mission.”
 15 *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1134 (9th Cir. 2019). *Accord, Garcia v. City of*
 16 *Los Angeles*, 481 F. Supp. 3d 1031, 1040–42 (C.D. Cal. 2020), *aff'd*, 11 F.4th 1113 (9th Cir.
 17 2021). Here, AB 130 and its new limits on virtual instruction has forced DREDF to redirect
 18 resources to protect its constituents. Decls of S. Henderson, C. Theis. DREDF thus has standing
 19 to seek an order that will relieve its affected constituents, since that will also allow it to
 20 “redirect” its resources back to other activities to advance its mission.

21 **1. Plaintiffs’ Medical Evidence Demonstrates Irreparable Harm**

22 As Plaintiffs’ medical expert Dr. Kuo explains, the Student Plaintiffs and other families
 23 have underlying health conditions that would make COVID-19 infections much more likely
 24 and/or more likely to lead to severe illnesses and death. The CDC has stated that “[c]urrent
 25 evidence suggests that children with medical complexity, with genetic, neurologic, metabolic
 26 conditions, or with congenital heart disease can be at increased risk for severe illness from
 27
 28

COVID-19.”¹⁶ Further, “children with obesity, diabetes, asthma or chronic lung disease, sickle cell disease, or immunosuppression can also be at increased risk for severe illness from COVID-19.”¹⁷ According to the CDC, people with moderate to severe asthma are more likely to get severely ill from COVID-19.¹⁸

Individuals with intellectual disabilities are at particularly high risk of contracting COVID-19 and of dying from COVID-19 infection. A recent study published in the New England Journal of Medicine—working with a data set of 64,414,495 patients across more than 500 U.S. healthcare systems—concluded that “intellectual disability was the strongest independent risk factor for presenting with a Covid-19 diagnosis and the strongest independent risk factor other than age for Covid-19 mortality.”¹⁹ The study found individuals with intellectual disabilities were more likely to contract COVID-19; if diagnosed with COVID-19, more likely to be admitted to the hospital; and more likely to die following admission.

According to the American Academy of Pediatrics, “the Delta variant has created a new and pressing risk to children and adolescents across this country” and pediatric cases of COVID-19 have been “skyrocketing.” *See* Dr. Kuo Decl. ¶ 16.²⁰ Data shows children are infected with the Delta variant at much higher rates than was true with previous virus strains, especially those who are unvaccinated (including those 5 to 11 years old who are not yet eligible to receive a vaccine). In Los Angeles County, between August 15 to 29, 2021, more than 5,300 students tested positive for COVID-19.²¹ Schools across the state continue to

¹⁶ CDC, Medical Conditions (last updated August 20, 2021) <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

¹⁷ *Id.*

¹⁸ *Id.*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

¹⁹ Jonathan Gleason, et. al, The Devastating Impact of Covid-19 on Individuals with Intellectual Disabilities in the United States, New England Journal of Medicine (March 5, 2021) (available online at <https://catalyst.nejm.org/doi/pdf/10.1056/CAT.21.0051>).

²⁰ Lee Savio Beers, American Academy of Pediatrics (August 5, 2021) https://downloads.aap.org/DOFA/AAP%20Letter%20to%20FDA%20on%20Timeline%20for%20Authorization%20of%20COVID-19%20Vaccine%20for%20Children_08_05_21.pdf

²¹ *See* Decl. of Dr. Kuo ¶ 14;

1 experience COVID-19 outbreaks and exposure of thousands of students statewide, even with
 2 widespread use of masks. “[T]he risk of exposure [to Covid-19] in a school environment is still
 3 very real, despite mask requirements.” Decl. of Dr. Kuo, ¶ 17. *See also* ¶¶ 13-16 (citing data on
 4 infection rates nationally and from her work with school districts in Los Angeles County).

5 The individual Plaintiffs and other similarly situated families and DREDF are at
 6 heightened risk of severe outcomes from COVID-19. Many children, such as Plaintiff E.E.,
 7 have Down syndrome and are at risk of serious, life-threatening complications from COVID-
 8 19.²² About half of all children with Down syndrome have heart defects that also diminish lung
 9 capacity.²³ Other students who need Independent Study have asthma and lung disease.
 10 California school districts regularly serve students with disabilities that place them at high risk
 11 for severe outcomes from COVID-19, including asthma, lung and heart conditions, cerebral
 12 palsy, intellectual disability (including Down syndrome and autism), and immune disorders.²⁴
 13 For these students, returning to school in person poses irreparable harm.

14 Dr. Kuo reviewed statements from the Student Plaintiffs and other families submitted in
 15 support of this motion. She concluded: “Parents are justified in taking strong steps to ensure that
 16 students with such diagnoses avoid exposure to COVID-19. Because of the significantly greater
 17 risk of serious illness or death if their children are exposed during in-person classes, these
 18 parents are justified in requesting a continuation of distance learning or another form of virtual
 19 instruction.” Kuo Decl., ¶ 3.

20 **2. The Student Plaintiffs, DREDF and DREDF’s Constituents are** 21 **Suffering Irreparable Harm.**

22 The loss of educational opportunities is a paradigmatic example of irreparable harm, as
 23 it is both intangible and deeply damaging. *See, e.g., Issa v. School Dist. of Lancaster*, 847 F.3d
 24

25 ²² *Id.*

26 ²³ National Down Syndrome Society, “The Heart and Down Syndrome,”
 27 <https://www.ndss.org/resources/the-heart-down-syndrome> (heart defects in child with Down
 28 syndrome lead to narrowed arteries in the lungs and increased pressure and constriction of blood
 flow).

²⁴ <https://www.cde.ca.gov/sp/se/sr/cefspeced.asp> (noting that 43,770 students are identified as
 having an intellectual disability).

1 121, 142 (3d Cir. 2017) (“[E]ven a few months in an unsound program can make a world of
 2 difference in harm to a child’s educational development”) (citing *Nieves-Marquez v. Puerto*
 3 *Rico*, 53 F.3d 108, 121-22 (1st Cir. 2003)) (internal quotation marks omitted); *see generally*
 4 *Faulkner v. Jones*, 10 F.3d 226, 233 (4th Cir. 1993) (affirming preliminary injunction against
 5 Citadel’s policy of excluding women). As detailed through the declarations filed herewith, AB
 6 130 has effectively shut disabled students out of virtual learning, causing them to remain at
 7 home for months without access to any educational instruction or related services. The Student
 8 Plaintiffs and other similarly situated children are irreparably injured by their forced absence
 9 from their school program.

10 Research shows that absences from school have a disproportionate impact on student
 11 well-being, even after a short period of time. A noted educational expert, Dr. Andrea Ruppap,
 12 explains that students with I/DD are uniquely vulnerable to injury from the forced absences
 13 because of the near certainty of skill regression. Ruppap Decl., ¶22. Students with I/DD are
 14 unlikely to maintain (i.e., remember) skills they have learned without regular opportunities
 15 practice previously learned skills. *Id.* “Thus, without steady and consistent educational
 16 programming, they are likely to fall behind in their achievement and skill acquisition, and
 17 unlikely to recoup these losses, even with remediation.” *Id.* Dr. Ruppap further identifies
 18 irreparable harm from the isolation students with I/DD are experiencing during the forced
 19 absences, particularly from the lack of meaningful access to communication with peers and
 20 educational professionals. *See id.*, ¶¶ 31-45. “Without an ability to communicate, individuals
 21 with [I/DD] can sometimes engage in dangerous or otherwise challenging behavior to express
 22 their need, which in turn can lead to intense behavioral challenges.” *Id.*, ¶ 44. Challenging
 23 behavior is associated with poor life outcomes for individuals with I/DD, including “more
 24 segregated, surveilled, and isolated living arrangements, fewer choices, and can also restrict
 25 employment opportunities.” *Id.*, ¶ 44.

26 Although many students struggled with distance learning in the 2020-21 school year,
 27 others made educational progress, including the Student Plaintiffs and other similarly situated
 28 children. Distance learning proved effective in delivering the services in their IEP plans while

1 maintaining their educational placement. Consequently, the interruption of their access to
 2 distance learning, whether through Independent Study or other means, has left them far behind
 3 where they would otherwise be. Unless this Court intervenes now, Plaintiffs and the proposed
 4 Class will suffer irreparable injury from the loss of school days that can never be regained.

5 **3. Disabled students have no meaningful alternative through Home**
 6 **Hospital Instruction.**

7 Home Hospital Instruction is *not* an alternative “work-around” to avoid irreparable
 8 injury to disabled students. Home Hospital Instruction is an at-home option for students who
 9 have a “temporary disability that makes attendance in the regular day classes or alternative
 10 education program impossible or inadvisable.” *See* Cal. Educ. Code § 48206.3 (at IEP teams
 11 can place students with disabilities on Home Hospital Instruction with a report from a medical
 12 provider “stating the diagnosed condition and certifying that the severity of the condition
 13 prevents the pupil from attending a less restrictive placement.” Cal. Code Regs., tit. 5,
 14 § 3051.4(d).

15 Home Hospital Instruction is not an effective alternative for students with IEPs who are
 16 unable to safely attend school in person. Most districts offer Home Hospital for only one hour
 17 per day, which is the minimum required in the statute. Cal. Educ. Code § 48206.3(c)(1). This is
 18 inadequate for most students with IEPs. For example, Plaintiff L.N.’s school district told his
 19 parent that, even if he qualified for Home Hospital, he would get only one hour of instruction
 20 per day. Decl. of K.N. She and many other parents were told by school personnel that their
 21 children will not get their normal special education services and supports if they are approved
 22 for the Home Hospital program. *See id.* and J.V. decl.

23 Further, Home Hospital provides no opportunity for interaction with peers, disabled or
 24 not. For this reason, it is regarded as the most restrictive placement on the special education
 25 continuum. Interaction with friends and peers is critical to emotional and social growth for
 26 children with disabilities. For example, the school district where student K.H. attends has
 27 arranged for a “Virtual Academy” for the many students who are choosing Independent Study.
 28 Decl. of C.H. The IEP team for student K.H. would not approve the Virtual Academy and

1 instead referred her to Home Hospital Instruction. Her mother has not agreed, because Home
 2 Hospital does not provide the opportunity for interaction with nondisabled peers that the virtual
 3 academy does. *Id.*

4 Even if parents agree to Home Hospital Instruction out of desperation, such a needlessly
 5 restrictive educational placement runs afoul of the requirement in the ADA that public entities
 6 “administer services, programs, and activities in the most integrated setting appropriate to the
 7 needs of qualified individuals with disabilities,” 28 C.F.R. § 35.130(d), which the Attorney
 8 General has defined as “a setting that enables individuals with disabilities to interact with non-
 9 disabled persons to the fullest extent possible,” 28 C.F.R. pt. 35, App. A, p. 450. See *Olmstead*
 10 *v. L.C.*, 527 U.S. 581, 600 (1999) (“unjustified institutional isolation of persons with disabilities
 11 is a form of discrimination”).

12 **C. The Proposed Injunction will Preserve the Status Quo.**

13 The requested injunction will maintain the status quo *ante litem* pending a determination
 14 of the case on the merits. See *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck*
 15 *Drivers Local No. 70 of Alameda Cnty*, 415 U.S. 423, 439 (1974); *Regents of Univ. of Cal. v.*
 16 *Am. Broad. Co.*, 747 F.2d 511, 514 (9th Cir. 1984).

17 Here, the status quo is the access that disabled students had to remote learning before the
 18 enactment of AB 130. This is the “last actual, peaceable, uncontested status which preceded the
 19 pending controversy.” *LaRouche v. Kezer*, 20 F. 3d 68, 74 n. 7 (2d Cir. 1994) (quoting Black’s
 20 Law Dictionary 1410 (6th ed.1990)). “The status quo to be preserved by a preliminary
 21 injunction . . . is not the circumstances existing at the moment the lawsuit or injunction request
 22 was actually filed, but the last uncontested status between the parties which preceded the
 23 controversy.” *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 378 (4th Cir. 2012)
 24 (citation omitted).²⁵ Since Plaintiffs here seek only to restore and maintain the status quo, the
 25

26 ²⁵ See also *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1260 (10th Cir. 2005) (variously defining
 27 *status quo* as “the last uncontested status between the parties which preceded the controversy
 28 until the outcome of the final hearing” or the “last peaceable uncontested status existing
 between the parties before the dispute developed”); *O Centro Espirita Beneficiente Uniao Do*
Vegetal v. Ashcroft, 389 F.3d 973, 1013 (10th Cir. 2004) (“‘Status quo’ does not mean the

1 requested injunction is prohibitory.

2 **D. The Balance of Equities and the Public Interest Both Favor Granting**
 3 **Plaintiffs' Immediate Relief.**

4 The balance of equities and the public interest both tip sharply towards Plaintiffs.
 5 *Frailhat*, 445 F. Supp. 3d at 749 (“Where the government is the opposing party, balancing of the
 6 harm and the public interest merge.”); *id.* (“[I]t is always in the public interest to prevent the
 7 violation of a party’s constitutional rights” and there is “no public interest in exposing
 8 vulnerable persons to increased risks of severe illness and death.”); *Harris v. Bd. of Supervisors*,
 9 *L.A. Cty.*, 366 F.3d 754, 766 (9th Cir. 2004) (interest in protecting people from physical harm
 10 outweighs government financial concerns).

11 Recent experience with emergency learning plans during quarantines demonstrates that
 12 there are feasible alternatives for students to learn virtually. From March 2020 to June 2021, the
 13 State guaranteed that students with disabilities could participate in distance learning with special
 14 education and related services required by the student’s IEP. Cal. Educ. Code § 43503(b)(4);
 15 Cal. Educ. Code § 43511(b). Students did not need to wait for an IEP meeting to determine
 16 whether they could enroll in distance learning.²⁶ The individual students for whom this motion
 17 for emergency relief is brought were successful in distance learning prior to July 2021.

18 Further, emergency distance learning plans are already a required component of the IEP
 19 for every California student with a special education disability. *See* Cal. Educ. Code §
 20 56345(a)(9) (IEP must include “A description of the means by which the individualized

21
 22 situation existing at the moment the law suit is filed, but the last peaceable uncontested status
 23 existing between the parties before the dispute developed) (citation omitted); *LaRouche v.*
 24 *Kezer*, 20 F.3d 68, 74 (2d Cir. 1994) (holding prohibitory relief can require the defendant to act
 25 because, “[t]o preserve the status quo a court may require the parties *to act* or to refrain from
 26 acting”); *United Steelworkers of Am., AFL–CIO v. Textron, Inc.*, 836 F.2d 6, 10, (1st Cir.1987)
 27 (concluding that an injunction requiring the payment of insurance premiums was properly
 28 viewed “not as mandatory, but as prohibitory” where the last uncontested status that preceded
 the pending controversy was a status in which the defendant paid the necessary premiums)
 (Breyer, J.). *See also* 11A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND*
PROCEDURE § 2948, at 136 (2d ed. 1995).

²⁶ *Supra* fn. 2.

1 education program will be provided under emergency conditions, as described in Section 46392,
 2 in which instruction or services, or both, cannot be provided to the pupil either at the school or
 3 in person for more than 10 school days.”). These services are required to be provided remotely
 4 to students with disabilities in the event of school closure or reduction in attendance. Cal. Educ.
 5 Code § 46393(a)(1). The State allows school districts to recuperate attendance funding for
 6 students with IEPs receiving their services at home. Cal. Educ. Code § 41422(c).²⁷

7 These existing models show that it is feasible for the state to provide distance learning to
 8 all students with disabilities who cannot safely attend school in person this year.

9 Here, Defendants will suffer no harm from an injunction that merely requires them to
 10 comply with federal law. The proposed TRO is narrowly tailored. Defendants must provide
 11 immediate relief only for the two Student Plaintiffs and the additional thirteen students listed in
 12 Attachment A to the proposed TRO and OSC.²⁸ The OSC re: preliminary injunction is also
 13 narrowly tailored: Defendants must restore the rights of students with disabilities to distance
 14 learning. All IEPs already contain a plan for providing instruction and services through distance
 15 learning in the event of an emergency where a student cannot go to school in person. The State
 16 also already has a funding mechanism for students with IEPs that need virtual instruction but
 17 where their IEPs do not provide for Independent Study.

18 Nor will the school districts that Defendants control and supervise suffer harm. Some
 19 students already have school staff who wanted to support them in Independent Study, but were
 20 prevented from doing so by orders from Defendants. Decls of A.J., ¶ 10 (school resource

21 _____
 22 ²⁷ See also California Department of Education, 2021-22 Form J-13A Frequently Asked
 23 Questions, (<https://www.cde.ca.gov/fg/aa/pa/formj13afaq2122.asp>) (Updated September 24,
 24 2021) (“Can a local educational agency (LEA) submit a Form J-13A request to mitigate
 25 attendance losses due to students with exceptional needs with individualized education
 26 programs (IEPs) that do not provide for participation in independent study? (New 17-Sep-2021).
 27 Yes. An LEA may submit a Form J-13A request for a material decrease due to a loss of
 28 attendance occurring as a result of students with exceptional needs whose IEPs do not provide
 for participation in independent study ... and/or for a closure of a school site or class that only
 serves students who are individuals with exceptional needs, whose IEP does not specifically
 provide for participation in independent study.”).

²⁸ As additional students come forward, Plaintiffs will offer Defendants an opportunity to
 resolve their situation, as Plaintiffs did before seeking this TRO.

1 teacher offered to provide plaintiff E.E. with same services virtually as she had during 2020-21
 2 school year); M.M., ¶ 8-9 (school wanted to provide virtual classes but district refused to
 3 authorize); Y.P., ¶ 7 (same); D.H. (same). Other districts and schools have spent the last year
 4 providing these same students with accommodations and special education services virtually.
 5 To continue to do so will neither burden nor fundamentally alter their educational programs.

6 Finally, the need for an injunction may be short-lived. As vaccination rates increase and
 7 risk from the pandemic eases, more students will be able to return safely to in-person classes,
 8 even those with medical conditions such as the Student Plaintiffs. But until this occurs, an
 9 injunction is needed.

10 **IV. PLAINTIFFS SHOULD NOT BE REQUIRED TO POST BOND.**

11 Federal Rule of Civil Procedure 65(c) “invests the district court ‘with discretion as to the
 12 amount of security required, *if any*.’” *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003)
 13 A district court has the discretion to dispense with the security requirement where to require a
 14 bond would effectively deny access to judicial review. *See Save Our Sonoran, Inc. v.*
 15 *Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005). Here, the Student Plaintiffs, DREDF and
 16 DREDF’s constituents lack the resources to post bond. Decls. of Susan Henderson, L.N., and
 17 A.J. They respectfully request that bond be waived.

18 **V. CONCLUSION**

19 Plaintiffs respectfully request that the Court grant this *ex parte* motion and order the
 20 relief as set forth in the accompanying proposed order as the earliest possible time.

21 Dated: 10/22/2021

Respectfully submitted,

22
 23 /s/Melinda Bird (as authorized on 10/22/2021)

Melinda Bird
 Disability Rights California

24
 25
 26 /s/David German (as authorized on 10/22/2021)

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1 /s/Claudia Center (as authorized on 10/22/2021)

2 Claudia Center

3 DREDF

4 *Attorneys for Plaintiffs*